

On October 5, 2002 appellant, then a 59-year-old regular rural carrier, filed a traumatic injury claim alleging that she had developed low back pain due to lifting in the performance of

duty. The Office accepted appellant's claim for herniated disc L4-5 on December 11, 2002 and entered her on the periodic rolls on December 12, 2002.

Appellant underwent a magnetic resonance imaging (MRI) scan on July 23, 2002 at the request of Dr. Dorothy Chase, a family practitioner, due to a clinical history of low back pain with radiation down the right lower extremity with some associated paresthesias. The MRI scan demonstrated minimal narrowing of the L4-5 disc space, a broad-based bulging annulus at the L3-4 and L4-5 levels with no focality or compression of the exiting nerve roots. Appellant's MRI scan also demonstrated a slightly bulging annulus at the L5-S1 level.

Following her accepted employment injury, appellant's attending physician, Dr. Stephen H. Johnson, a Board-certified neurosurgeon, recommended conservative treatment and epidural injections. He noted that the initial MRI scan following appellant's date of injury demonstrated a very small subligamentous disruption at L4-5. Dr. Johnson recommended an additional MRI scan on May 13, 2003 due to a severe worsening of appellant's radiculopathy. The June 3, 2003 MRI scan demonstrated a slight increase in size of small left-sided herniations at L3-4 and L4-5, but no nerve root impingement. Dr. Johnson reviewed the June 3, 2003 MRI scan on June 10, 2003 and found no evidence of significant nerve root compression. He recommended a myelogram. Appellant's June 26, 2003 myelogram demonstrated no evidence of significant degenerative disc disease with slight underfilling of the left S1 nerve root. The computerized tomography (CT) immediately following the myelogram demonstrated mild bulging discs at L3-4, L4-5 and mild Grade 1 spondylolisthesis at L5-S1. Following these tests, Dr. Johnson recommended an electromyogram (EMG) of the right leg to rule out radiculitis. Appellant's August 26, 2003 EMG was reported as normal with no electrodiagnostic evidence of a right lumbosacral motor radiculopathy. Dr. Johnson recommended additional physical therapy on September 11, 2003 and additional testing for unusual causes of appellant's pain on November 13, 2003. He stated that the etiology of appellant's pain was unclear and that the MRI scan suggested minor pathology all on the left side. Dr. Johnson continued to support appellant's total disability for work.

Dr. Johnson examined appellant on January 13, 2004 and stated that she was disabled from her work requirements of lifting, bending and twisting. He stated that it was unclear when appellant might recover completely and that appellant should not return to the employing establishment. Dr. Johnson examined appellant on July 15, 2004 and noted that she experienced back and leg pain associated with discogenic pathology that was nonoperative. He noted that appellant's low back pain was constant and opined that she was permanently disabled from her date-of-injury position due to the heavy lifting required. Dr. Johnson suggested work hardening.

On July 30, 2004 the Office referred appellant for a second opinion evaluation with Dr. John McConville, a Board-certified orthopedic surgeon. In an August 17, 2004 report, Dr. McConville noted that appellant had a preexisting back condition warranting an MRI scan three months before her accepted employment injury. He found no palpable muscle spasm or guarding on physical examination with lateral flexion bilateral to 30 degrees with no complaints of pain. Dr. McConville noted that appellant had pain with forward flexion and hyperextension of the lumbar spine. He stated that appellant could heel and toe walk with no weakness in dorsiflexion or plantar flexion in the right lower extremity. Dr. McConville also reviewed appellant's diagnostic studies and concluded that they demonstrated mild to moderate

degenerative changes in the lumbar spine consistent with appellant's age. He stated, "[A]ll objective diagnostic imaging studies, including conventional x-rays, myelogram, MRI scan studies, bone scan and EMG testing have disclosed no obvious, easily recognizable and understandable objective problems that could be considered consistent with the duration and severity of the complaints of [appellant]." Dr. McConville noted that appellant's objective diagnostic tests gave no evidence of easily observable and readily recognizable significant lumbar disc derangement. He diagnosed acute lumbosacral sprain, chronic low back syndrome with intermittent mild right lumbar radiculopathy, lumbosacral instability with Grade 1 spondylolisthesis L5-S1 and subligamentous L4-5 lumbar disc displacement (resolved). Dr. McConville concluded that appellant's final diagnosis was related to her accepted employment injury of October 5, 2002. He listed appellant's back diagnoses as acute lumbosacral sprain (resolved) and primary lumbosacral instability with L4-5 subligamentous disc derangement, improved.

Dr. McConville concluded that appellant did not have substantiating objective findings either in terms of physical examination or diagnostic imaging procedures to justify her claim for total disability. He stated that appellant could return to limited-duty work eight hours a day with limitations on lifting more than 20 pounds, as well as repeated bending, stooping and twisting. Dr. McConville stated that appellant should be allowed to change positions. He stated that appellant's October 5, 2002 injury was an aggravation of a preexisting back condition, that she did not require further medical treatment and that she was capable of work. Dr. McConville concluded that appellant had no residuals of her work-related condition.

In a letter dated September 27, 2004, the Office proposed to terminate appellant's compensation benefits on the grounds that she had no medical residuals of her accepted employment injury based on Dr. McConville's August 17, 2004 report. It allowed appellant 30 days for a response.

On October 22, 2004 appellant's attorney responded to the Office's notice of proposed termination, contending that Dr. McConville failed to base his report on a proper factual background as he found that appellant had sustained an aggravation of preexisting conditions rather than a herniated disc as accepted by the Office. Appellant submitted a report from Dr. Chase dated October 21, 2004 which stated that appellant developed low back pain on November 6, 2001, which she diagnosed as a strain and which resolved. She attributed this back pain to lifting in the performance of appellant's federal job duties and opined that appellant's back symptoms were all due to her employment activities. Dr. Chase also completed a work-restriction evaluation and indicated that appellant was totally disabled due to back pain.

By decision dated May 20, 2005, the Office terminated appellant's compensation benefits effective May 31, 2005 as it found she had no residuals of her work-related injury.

Appellant requested an oral hearing on May 26, 2005. She testified at the oral hearing on January 18, 2006 and her attorney alleged that Dr. McConville's report was not sufficient to meet the Office's burden of proof.

Following the oral hearing, appellant submitted a report from Dr. Chase dated January 5, 2006 which stated that an October 25, 2004 MRI scan demonstrated a left L5 protrusion of the disc that abuts the left L5 nerve root causing pain down her left leg.

By decision dated April 3, 2006, the hearing representative affirmed the Office's May 20, 2005 termination decision finding that the weight of the medical evidence established that the injury-related condition had resolved.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>2</sup> The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>4</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted appellant's claim for herniated disc at L4-5 and entered her on the periodic rolls on December 12, 2002. Appellant's attending physician, Dr. Johnson, a Board-certified neurosurgeon, diagnosed a work-related nonoperative discogenic condition and supported appellant's disability for work through July 2004. The Office referred appellant for a second opinion evaluation with Dr. McConville, a Board-certified orthopedic surgeon. On August 17, 2004 he found that appellant had no residuals of her employment injury, required no further medical treatment and could perform limited-duty work eight hours a day. The Office based its termination of appellant's compensation and medical benefits on Dr. McConville's August 17, 2004 report.

The Board finds that there is an unresolved conflict of medical opinion evidence between Dr. McConville and Dr. Johnson. The Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an

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<sup>1</sup> *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

<sup>2</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

<sup>3</sup> *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

<sup>4</sup> *Mary A. Lowe*, *supra* note 2.

<sup>5</sup> *Daniel F. O'Donnell, Jr.*, 54 ECAB 456, 460 (2003).

examination.<sup>6</sup> The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.<sup>7</sup>

Dr. McConville, the second opinion physician selected by the Office, provided a detailed analysis of appellant's physical findings and diagnostic testing and concluded that appellant was not totally disabled due to her accepted employment injury, that she had no residuals of her employment injury and did not require further medical treatment. On the other hand, appellant's attending physician, Dr. Johnson, found that she was totally disabled due to her accepted disc pathology. Due to this unresolved conflict in the medical opinion evidence, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

### **CONCLUSION**

The Board finds that there is a conflict of medical opinion regarding the nature and extent of appellant's accepted employment injuries and resultant disability. Therefore the Office has not met its burden of proof to terminate appellant's compensation and medical benefits.

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<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8123.

<sup>7</sup> 20 C.F.R. § 10.321.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 3, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 26, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board